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IN THE

Supreme Court of the United States

1973 TERM

No. 73-427

In the Matter of the Application of
DIANE BERNI, BARBARA D. HAHN, DONNA M. MARSH, LOIS NEWMAN, CAROL RYDER, and all those similarly situated,

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules,

Petitioners,

— against —

ADELE LEONARD, Executive Directrix of the Nassau County Civil Service Commission and the Nassau County Civil Service Commission, and LOUIS J. FRANK, Commissioner of Police of the County of Nassau and the POLICE DEPARTMENT OF THE COUNTY OF NASSAU,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the State of New York filed June 7, 1973.

Citations to Opinions Below

The opinion of Special Term, Supreme Court, Nassau County, State of New York denying Petitioners' application under Article 78 of the Civil Practice Law and Rules for the State of New York is printed in Appendix C and is reported at 333 NYS 2d 193 (1972); 69 Misc 2d 935. The Appellate Division of the Supreme Court, Second Department, affirmed the findings of Special Term by a 4-to-1 majority, the majority affirming without opinion while the dissenting Justice set forth a written dissent, the entire case being reported at 336 NYS 2d 620 (1972) and is printed in Appendix B. The opinion of the Court of Appeals of the State of New York affirmed the Appellate Division's holding with one Judge dissenting, the opinion of the Court of Appeals having been filed June 7, 1973, is printed in Appendix A and as yet has not been reported in any official reports.

Jurisdiction

The judgment of the Court of Appeals was filed June 7, 1973. The Court of Appeals by its action affirmed the lower court's decision denying the relief sought by Petitioners and thereby exhausted Petitioners' state remedies.

The jurisdiction of this Court is invoked under 28 USC §1257(3).

The Question Presented

Whether or not Petitioners' constitutional guarantees under the XIV Amendment are violated by Respondents applying and interpreting certain statutes whereby Petitioners are denied the opportunity to take a Civil Service examination for promotion to the rank of sergeant, said denial being based solely on the fact that Petitioners are females as opposed to males.

Constitutional Provisions, Statutes, Rules, Etc. Involved

The Constitutional and Statutory provisions applicable herein are the XIV Amendment to the United States Constitution, in particular, the "equal protection clause" therein, Section 291(1) of the Executive Law of the State of New York, Section 296(1) of the Executive Law of the State of New York, Section 50, Subdivision 7 of the Civil Service Law of the State of New York, Section 703(e) of the Civil Rights Act of 1964 as set forth in 42 United 11 of the Constitution of the State of New York. The above Constitutional and statutory provisions are printed in Appendix D.

Statement

Petitioners are female Police Officers duly appointed to the Nassau County Police Department, State of New York, said appointments having occurred more than four (4) years ago. The Respondents have caused to be promulgated two (2) separate promotional examinations for promotion to the rank of Sergeant, one of said promotion examinations being applicable only to Patrolmen and the other promotional examination being applicable only to Police women.

The Promotional examinations in question were scheduled for April 29, 1972. Petitioners were denied the opportunity to take the promotional examination associated with the promotion of Patrolmen to the rank of Sergeant. Petitioners, however, were permitted to take the promotional examination associated with the promotion of police women to the rank of sergeant. The sole basis for denying Petitioners the opportunity to take the promotional

examination associated with the promotion of patrolman to the rank of sergeant is based upon the fact that Petitioners are female as opposed to being male.

The detriment to Petitioners of not being permitted to participate and therefore compete for the rank of sergeant pursuant to the promotional examination available to policemen is the fact that the number of available sergeant positions associated with the promotional test applicable to policemen is far in excess of the number of Sergeant positions available with regard to the promotional examination associated with policewomen. More specifically, approximately one-hundred (100) Sergeant positions are available for filing by the promotional examination associated with Policemen while the number of sergeant positions available for filing by the promotional examination associated with Policewomen is approximately two (2). Since examinees of each examination are ranked in order of their score and then the number of available positions are filled from said ranking, Petitioners are effectively excluded from being promoted to the rank of Sergeant since the present system only permits Petitioners to compete for a limited number of sergeant positions in comparison to their fellow male officers.

To further compound the injustice with regard to the above, Respondent, Adele Leonard, in her affidavit submitted in the proceedings in the Supreme Court, for the County of Nassau, State of New York, stated, when comparing the two promotional examinations;

> "the general subject matter of both examinations is similar. . . ."

Respondent, Louis J. Frank, the Commissioner of Police for the County of Nassau, stated in his affidavit submitted in the proceedings in the Supreme Court for the County of Nassau, when comparing the two promotional examinations that;

> "The content of both examinations is identical...."

In response to Respondents denying Petitioners the right to participate in the promotional examination for sergeants applicable to Policemen, and thus compete for approximately one-hundred (100) Sergeant positions, Petitioners indicated in the Supreme Court of the County of Nassau, State of New York, by way of an Order to Show Cause, a proceeding pursuant to Article 78 of the Civil Practice Laws and Rules of the State of New York wherein Petitioner sought an Order from the Court directing Respondents to cancel and annul the two (2) promotional examinations scheduled for April 29, 1972, since a dual examination system for promotion to Sergeant in the Nassau County Police Department as applicable to Petitioners, was contrary to the XIV Amendment to the United States Constitution, Sections 291(1) and (296(1) of the Executive Law of the State of New York, Section 50, Subdivision 7 of the Civil Service Laws of the State of New York and Section 703(e) of the Civil Rights Act of 1969 as set forth in Title 42, United States Code, Section 2000e-2 since the dual examination process unlawfully discriminated against Petitioners in their ability to compete for all available sergeant positions said discrimination being based solely upon the fact that Petitioners are females as opposed to being males.

Special Term of the Supreme Court, County of Nassau, denied Petitioners petition under Article 78 of the Civil Practice Laws and Rules of the State of New York (see Appendix C). The Appellate Division of the Supreme Court, Second Department affirmed the findings of the Special Term by a four (4) to one (1) majority, the majority affirming without opinion, the dissenting justice setting forth a written dissent (see Appendix B). The Court of Appeals of the State of New York affirmed the Appellate Division's holding with one Judge dissenting (see Appendix A).

Basis for Granting the Writ

This Petition raises substantial and important questions concerning the rights of an individual to be free from sex discrimination with regard to job opportunities and promotion within one's field of employment, it having been heretofore determined that the Police Department as an entity is not legally shielded from providing equality of employment opportunity to its members as well as recognizing their civil rights *Mize* v. *State Division of Human Rights*, 38 A.D. 2d 278, 328 N.Y.S. 2d 983.

Under the XIV Amendment to the United States Constitution, and Article 1, Section 11 of the New York State Constitution, and in particular, the "equal protection clauses" there under, Petitioners are guaranteed to be free from state action which attempts to discriminate against Petitioners based upon their sex with regard to job opportunities and promotions with regard thereto.

In support of the above, the State of New York has specifically legislated on this point, in particular, Section 291(1) of the Executive Law of the State of New York, which states:

> §291. Equality of opportunity a civil right.
>
> 1. The opportunity to obtain employment without discrimination because of race, creed, sex, color or national origin is hereby recognized as and declared to be a civil right.

and Section 296(1) of the Executive Law of the State of New York, (see Appendix D), which in essence makes it an unlawful discriminatory practice for an employer to utilize sex as a limitation upon employment where such limitation is not a "bona fide occupational qualification".

Additionally, the New York State Legislature in Section 50, Subsection 7, of the Civil Service Law (see Appendix D) directed that both State and municipal civil service agencies can only limit eligibility for an examination to one's sex when the "duties of the position involved relate to the institutional or other custody or care of persons of the same sex, or visitation, inspection or work of any kind the nature of which requires sex selection." The Federal Government has also spoken in this area and enacted Section 703(e) of the Civil Rights Act of 1964 as set forth in Title 42, United Code, Section 2000e-2 which specifically states that it shall be an unlawful employment practice for an employer to utilize sex as a discriminatory hiring criterion when said criterion is not a bona fide occupational qualification.

Petitioners respectfully submit to the Court that the issue presented herein is not related to the question of whether or not sex can be a criterion for the hiring of a Policeman or a Policewoman when said individual is initially hired at the lower rank by the Police Department. A great deal of the rationale expressed by Respondents in the Courts below, as well as in the opinions from the Courts below was mistakenly concerned with this question. Petitioners are not attempting to have this Court pass upon the question of whether or not there is a "bona fide occupational qualification" as to sex with regard to the hiring of Police personnel at the lowest rank. On the contrary, the question presented to this Court is one related to that of a supervisory position, namely, the rank of Sergeant and as has heretofore been decided, traditional stereotype labels, unsupported in fact, as to femininity versus masculinity, must not be made part of the qualifications for such employment or promotion. *New York State Division of Human Rights* v. *New York — Pennsylvania Professional Baseball League*, 36 A.D. 2d 364, 320, N.Y.S. ed 788, affd. 29 N.Y. 2d 921, 329 N.Y.S. 2d 99.

As stated previously and acknowledged by Respondent, Adele Leonard, the Executive Directrix of the Nassau County Civil Service Commission, when comparing the two (2) promotional examinations, she stated:

> "the general subject matter of both examinations is similar"

According to Respondent, Louis J. Frank, the Police Commissioner for the County of Nassau. as previously stated in comparing said two promotional examinations;

> "The content of both examinations is identical. . . ."

Upon review of the Nassau County class specification with regard to Policewomen Sergeants and the Nassau Class specification with regard to Police Sergeants (see Appendix E), it can readily be seen that as stated previously, the duties of a Sergeant are supervisory and administrative in nature and for all protectional purposes the differentiation between the Policewomen Sergeant classification and Police Sergeant classification is not justifiable as a matter of law and is based solely on sexual bias. There is absolutely no "bona fide occupational qualification" for the supervisory position of Sergeant which, as a matter of law, justifies the dual class distinction of male and female Sergeant examinations and categories. (See also Appendix F which sets forth the announcements for each examination in question, said announcements having basically identical qualifications except for sex).

In support of the above, the court's attention is further directed to the fact that it is well established that in determining what is a "bona fide occupational qualification" sufficient to permit discrimination in hiring and promotion within one's field of employment, the federal courts (*Weeks* v. *Southern Bell Tel. & Tel. Co.*, 10 Cir., 408 F. 2d 228; *Bowe* v. *Colgate-Palmolive Co.*, 7 Cir., 416 F. 2d 711; *Cheatwood* v. *South Central Bell Tel. & Tel. Co.*, D.C., 303 F.

Supp. 754) as well as the New York Courts *(New York State Division of Human Rights* v. *New York-Pennsylvania Professional Baeeball League, supra*) have adopted the proposition that the burden of sustaining the discriminatory practice as a "bona fide occupational qualification" falls upon the party asserting its applicability. As stated in *Weeks* v. *Southern Bell Tel. & Tel. Co.*, supra, at page 235 the court stated:

> "We hold that in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."

Respondents basis for attempting to fall within the "bonafide occupational qualification" exception by establishing, and thereby discriminating according to sex, two promotional examinations for the rank of sergeant, is that one cannot fulfill such a supervisory position without having first performed, for a four year period, the duties over which said supervision is to occur, and thus, since a policewoman did not perform all of the job classification duties of a patrolman, therefore, she could not supervise patrolmen in such duties.

The irrationality in such a position is that it is an accepted fact that in the Nassau County Police Department, men who hold the rank of sergeant and who are supervising patrolmen, did not, prior to their promotion to the rank of sergeant, serve in every capacity of patrolman prior to that promotion and that such criterion in fact does not apply to policemen seeking to take the promotional examination for sergeant. On the contrary, many patrolmen who are now sergeants, served in the identification bureau, scientific investigation bureau or performed liaison work and never

were patrolmen in the sense of working as a foot patrolman or assigned to a traffic squad. Surely, if Respondents' reasoning and that of the lower courts was carried out to its logical conclusion, those sergeants, who spent their time as patrolmen in the above specialized areas, are illegally holding the rank of sergeant since they were not qualified to take the examination for sergeant which they obviously passed and whose position they are obviously satisfactorily fulfilling.

Petitioners do not seriously contend that there are male sergeants, as stated above, who are illegally serving in said capacity; but rather, Petitioners do contend that Respondents attempt to place Petitioners in the "bona fide occupational qualification" exception based upon sex for promotion to the rank of sergeant in the Nassau County Police Department is arbitrary, capricious, whimsical and without legal basis as evident from the above.

In support of the above, the court's attention is directed to the case of *Matter of Shpritzer* v. *Lang*, 17 A.D. 2d 285, 234 N.Y.S. 2d 285, affd. 13 N.Y. 2d 744, 241 N.Y.S. 2d 869, which held that the city of New York's Police Department could not prevent female members of the Department from taking the promotional examination for sergeant. The court at 17 A.D. 2d 290 stated:

> "Nothing in the broad definition of the duties of sergeant (Rules and Procedures of the Police Department, par. 16.3) are [*sic*] clearly impossible of performance by policewomen because of sex. There are practical physical problems which warrant reasonable distinctions because of facilities, and even the very nature of a particular problem may necessitate a uniquely desirable approach, independent of considerations of sex. The Commissioner remains vested with discretionary power to use his best judgment. We hold no more than that petitioner and others similarly situated cannot be

> arbitrarily denied the right to take the examination for sergeant because of their sex, and no reasonable grounds have been shown to warrant the 'sex selection' evidenced."
>
> "From the record women are serving as superior police officers in other cities of this country and in London as well. We would suppose, in the absence of contrary evidence, that the problems of law enforcement officers in such cities differ more in degree than in kind from those encountered here. The capacity and ability of females to hold a superior office in a police department has been demonstrated by the experience of other cities. We conclude that the denial of eligibility is solely because of sex, is unwarranted in law and, in light of present-day conditions constituties an abuse of discretion."

The above language is extremely relevant to the case before this Court as it is Petitioners contention that upon review of the Nassau County Civil Service Commission's class specifications related to the position of police woman sergeant and the position of police sergeant (Appendix E) that nothing therein would prevent a female from performing the duties of police sergeant. In addition, since it is an admitted fact by the Respondents that the promotional examinations in question as applicable to police women and patrolmen are either "identical in content" or the "general subject matter is similar", that Respondents thereby fail to meet the "bona fide occupational qualification" basis for permitting Respondents to discriminate in job promotion based upon Petitioners sex.

CONCLUSION

For the reasons stated above, Petitioners, respectfully submit that this petition for a Writ of Certiorari be granted.

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Appendix A

STATE OF NEW YORK COURT OF APPEALS
No. 57

In the Matter of

DIANE BERNI, BARBARA D. HAHN, DONNA M. MARSH, LOIS NEWMAN, CAROL RYDER, et al.,
Appellants,

ADELE LEONARD, Executive Directrix of Nassau County Civil Service Commission, Nassau County Civil Service Commission, and LOUIS J. FRANK, Commissioner of Police of County of Nassau, and Police Department of the County of Nassau,
Respondents.

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

MEMORANDUM:

The prescription by the Civil Service Commission of minimum requirements for the Police Sergeant examination to include four years experience as a police patrolman is not *per se* unreasonable, and bears a sufficient relationship to and nexus with the position to be filled, upon the facts in this case. (cf. *Matter of Wirzberger* v. *Watson,* 305 N.Y. 507, 513). The record does not sustain a claim, and indeed none is here made, that women are denied the opportunity to become patrolmen. Petitioners have not, therefore, successfully attacked this initial classification as a discriminatory act.

Appendix A

• • • •

Order affirmed, without costs, in a memorandum. All concur except Fuld, Ch. J., who dissents and votes to reverse and grant the application of petitioners on the dissenting opinion at the Appellate Division.

Appendix B

At a Term of the Appellate Division of the Supreme Court of the State of New York Second Judicial Department, held in Kings County on October 24, 1972.

HON. M. HENRY MARTUSCELLO
Acting Presiding Justice

HON. J. IRWIN SHAPIRO
HON. FRANK A. GULOTTA
HON. ARTHUR D. BRENNAN
HON. A. DAVID BENJAMIN
Associate Justices

In the Matter of

DIANE BERNI et al.,

Appellants,

— against —

ADELE LEONARD, Executive Directrix of the Nassau County Civil Service Commission et al.,

Respondents.

Order on Appeal from Judgment—Civil Action or Proceeding.

In the above entitled cause, the above named Diane Berni et al., petitioners, having appealed to this court from a judgment of the Supreme Court, Nassau County, dated March 28, 1972, which denied their application to compel respondents to cancel two promotion examinations, one for the position of Police Sergeant and the other for that of Sergeant; the said appeal having been submitted by Richard Hartman, Esq., of counsel for the appellant, and by Biagio F. Giaquinto, Esq. of counsel for the respondent, due deliberation having been had on said

appeal, and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby affirmed, without costs. Martuscello, Acting P.J., Gulotta, Brennan and Benjamin, JJ., concur. Shapiro, J., dissents and votes to reverse and to grant the application, with dissenting memorandum.

Enter:

Clerk of the Appellate Division.

APPENDIX B

Supreme Court, Appellate Division, Second Department. Oct., 24, 1972. In a proceeding pursuant to article 78 of the CPLR to compel respondents to cancel two promotion examinations, one for the position of Police Sergeant and the other for that of Policewoman Sergeant, petitioners appeal from a judgment of the Supreme Court, Nassau County, 69 Misc.2d 935, 235, 331 N.Y.S.2d 193, dated March 28, 1972, which denied the application. Judgment affirmed, without costs. No opinion.

MARTUSCELLO, Acting P. J., and GULOTTA, BRENNAN and BENJAMIN, JJ. concur.

SHAPIRO, J., dissents and votes to reverse and to grant the application, with the following memorandum:

Petitioners are employed as *policewomen* in the respondent Nassau County Police Department. They seek admission to a promotion examination for police sergeant. One of the requisites for taking that examination is that the candidate shall have served as a policeman for four years immediately prior to the examination. It seems to be undenied that petitioners meet all other necessary qualifications except that, as policewomen, their required

four years of service immediately prior to taking the examination were not as police patrolmen but as policewomen.

The announcement that the promotion examination for *police sergeant* was to be given on April 29, 1972 was accompanied by an announcement of a second promotion examination, to be given on the same date, for *policewoman sergeant*. The latter examination is described by the respondent Police Commissioner as "identical" in content with that for police sergeant and as "similar" by the Executive Director of the Nassau County Civil Service Commission. The salaries for both positions are identical. It appears, however, that there are only two openings for the position of policewoman sergeant, while an undisclosed (but apparently much larger) number of openings are available for police sergeant. Seven of the total of 28 policewomen in the Police Department have applied to take the policewoman sergeant examination, while 1,850 patrolmen out of an undisclosed total have filed for the police sergeant examination.

From 1968 to April 13, 1972 "268 Nassau County policemen have been promoted to the position of police sergeant and, of that number, 240 have been assigned to patrol force" and in 1972, 65 policemen were promoted to sergeant, 63 of them being assigned to the patrol force. It thus seems crystal clear that in the future there will almost certainly be far more openings for police sergeants than for policewoman sergeants.

After setting forth at some length the differences between the duties assigned to police patrolmen as distinguished from policewomen, Police Commissioner Frank, in his answering affidavit (without discussing the more relevant issue of the differences, *if any*, between the duties assigned to police sergeants and policewoman sergeants), asserts:

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> **"It is clear from the aforementioned differences in duties between police patrolmen and policewomen that separate line of promotion must be established. To allow policewomen to be promoted to the position of police sergeant would create a chaotic situation within the Nassau County Police Department. Their training and experience as well as their physiological makeup would make it impossible for them to perform the general functions necessary to fill the regular position of police sergeant as supervisors of patrolmen."**

The affidavit of the Executive Director of the Nassau County Civil Service Commission makes no mention of resultant "chaotic" situations within the Department. It stresses, instead, the fact that a policewoman sergeant's duties of supervision, instruction and assistance of policewomen includes supervision of what they do, investigations involving neglected, abused or delinquent children, and inspection of disorderly and suspicious premises which may be frequented by women and minors, whereas a police sergeant's duties, which she describes as "far more general and encompassing", include "assistance and instruction of patrolmen in the discharge of their duties, the observance of conditions at police posts, inspection of department vehicles and equipment assigned to patrolmen for serviceability, cleanlines and accuracy and the direction and performance of criminal investigations." Possibly recognizing that the foregoing list of duties of a police sergeant includes no duty that a woman may not be able to do as well as or perhaps even better than a man, the Executive Director's affidavit then returns to a discussion of the differences between the duties of policewomen and policemen in terms of policewomen dealing primarily with women and children, not dealing with enforcement of the

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Vehicle and Traffic Law and not travelling in patrol cars, whereas the contrary is the case with patrolmen, and policewomen not having to pass as strenuous physical strength and agility tests as patrolmen to qualify for their respective positions. But there is no claim made that these requirements are required or necessary for filling the position and carrying out the duties of police sergeant as distinguished from that of policeman.

The typical duties of a police sergeant, set forth in an exhibit to the Executive Director's affidavit in support of respondents' answer, states that a police sergeant supervises the activities of patrolmen on an assigned shift within the command to which he is attached and performs related duties as required. It states also that, under supervision, he plans, directs and organizes the activities of the patrolmen under his control. Typical duties of the position are listed as assisting and instructing patrolmen in the discharge of their duties, visiting and inspecting posts to observe conditions and the manner in which patrol duty is performed, reviewing reports submitted by patrolmen, inspecting departmental vehicles and equipment assigned to patrolmen for serviceability, cleanliness and accuracy of speedometer readings, preparing daily reports of activities during his assigned shift and directing and performing criminal investigations as assigned. *The qualifications listed are identical with those required for policewoman sergeant, except that there are added a requirement of knowledge of traffic control and an ability to transmit complex oral and written instructions by means of radio and teletype equipment.* It seems obvious that such abilities are by no means limited to males or that they required the greater strength which is allegedly a characteristic of that sex.

With certain stated exceptions, the opportunity to obtain employment without discrimination because of sex is

a civil right under section 291 of the Executive Law. Such discrimination may also be barred under section 703(a) of the Civil Rights Act of 1964 (U.S.Code, tit. 42, § 2000e—2[a]) and the requirements of that section apply to police departments (Mize v. State Div. of Human Rights, 38 A.D. 2d 278, 328 N.Y.S.2d 983). The exception in the Executive Law (§ 296, subd. 1, par. [d]) and in the Civil Service Law (§ 50, subd. 7) permits discrimination where the sex or other characteristic is a bona fide occupational qualification for the position. Therefore the legality of respondents' position in barring petitioners from taking the examination for police sergeant depends on whether *respondents* have demonstrated that the requirement of being a male and of having served for four years as a patrolman (rather than as a policewoman) is a bona fide occupational qualification for the position of police sergeant.

In determining what is a bona fide occupational qualification sufficient to permit the discrimination sanctioned by Title VII of the Civil Rights Act of 1964 the federal courts have consistently required that the exception be affirmatively established by the party asserting its applicability (Weeks v. Southern Bell Tel & Tel. Co., 10 Cir., 408 F.2d 228; Bowe v. Colgate-Palmolive Co., 7 Cir., 416 F.2d 711; Cheatwood v. South Central Bell Tel. & Tel. Co., D.C., 303 F.Supp. 754). This view was adopted in New York State Div. of Human Rights v. New York-Pennsylvania Professional Baseball League, 36 A.D.2d 364, 320 N.Y.S. 2d 788, in which the petitioners (a baseball league and others) unsuccessfully contended that the male sex is a "bona fide occupational qualification" under section 296 (subd. 1, par. [d]) of the Executive Law and section 703 (subd. [e]) of the Civil Rights Act of 1964 (U.S.Code, it. 42, § 2000e—2, subd. [e]) for the position of baseball umpire. The court said (pp. 367-368):

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> "The courts have given this provision a narrow construction. In Weeks v. Southern Bell Tel. & Tel. Co. (*supra*, 408 F.2d p. 235) the Court of Appeals for the Fifth Circuit stated: 'We hold that in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and effciently the duties of the job involved.'"

The court also noted (p. 368, 320 N.Y.S.2d 788) that the guidelines of the Equal Employment Opportunity Commission (Code of Fed.Reg., tit 29, § 1604.1, subd. [a]) (the federal agency which administers the anti-discrimination provisions of Title VII [*supra*]), which guidelines the federal courts have held are entitled to "great deference" (Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed. 2d 616; Phillips v. Martin Marietta Corp., 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613 [concurring] opn. by Marshall, J.]; Griggs v. Duke Power Co., 401 U.S. 424, 434, 91 S. Ct. 849, 28 L.Ed.2d 158; Weeks v. Southern Bell Tel. & Tel. Co., 408 F.Supp. 228, *supra;* Sprogis v. United Airlines, 7 Cir., 444 F.2d 1194, 1198), "reject the proposition that an employer can refuse 'to hire an individual based on stereotyped characterizations of the sexes' (Code of Fed. Reg., tit. 29, § 1604.1, subd. [a], par. [1], subpar. [ii]" and that "the exception is primarily to apply 'where it is necessary for the purpose of authenticity or genuineness *** i.e. an actor or actress' (Code of Fed. Reg., tit. 29, §1604.1, subd. [a], par. [2])."

Dealing with a class action brought by a group of men suing their employer, an airline, because the latter had violated the 1964 Civil Rights Act by refusing to employ them as cabin attendants by reason of their sex, the United

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States Court of Appeals for the Fifth Circuit ruled in favor of the plaintiffs (Diaz v. Pan Am. World Airways, 5 Cir., 442 Fd.2d 385). It rejected the justifications advanced by the defendant, and accepted by the trial court, (1) that the airline's passengers overwhelmingly preferred to be served by female stewardesses and (2) that since, according to expert testimony of a psychiatrist, an airplane cabin is a special unique environment in which the carrier must take account of special psychological needs of its passengers, and since females are better for this, the employer could ease the job of recruiting cabin attendants if it could use as its best available tool for screening out applicants, the entire class of those most likely to be unsatisfactory, males, even though there might be a few males who could meet the special psychological needs of the employer's passengers. The Court of Appeals stated that the test of the statute is "reasonably necessary", not business convenience, citing the test laid down in *Weeks (supra)*, quoted above. The court stated that it did not agree that all or substantially all men "have been shown to be inadequate" (408 F.2d p. 388). It thereupon reversed the judgment of the trial court and determined that the employer had not established a bona fide occupational qualification justifying employment of women only.

In Ridinger v. General Motors Corp., D.C., 325 F. Supp. 1089, 1096 the court stated that the statutory exception for a bona fide occupational qualification has been given a limited construction by the courts to avoid frustrating the purposes of the statute, adding that a bona fide occupational qualification is not established by an assumption or stereotyped characterization that very few women could perform a particular job.

In my view it is just such a stereotyped characterization that is the basis for the ruling here under attack.

Appendix B

Police Commissioner Frank, presenting no factual basis for believing that all policewomen with four years experience as such would be unable to perform safely and efficiently the duties of police sergeant, merely says, "To allow policewomen to be promoted to the position of police sergeant would create a chaotic situation within the Nassau County Police Department," adding the conclusory statement, with no factual basis therefor, that "their training and experience as well as their physiological makeup would make it impossible for them to perform the general functions necessary to fill the regular position of police sergeant as supervisors of patrolmen." He points to no duties of police sergeants which women could not perform because of their physical makeup; and the fact that the promotion examinations for police sergeant and for policewoman sergeant are identical negative and destroy his claim of differences in duties. The following statement of the court in Matter of Shpritzer v. Lang, 17 A.D.2d 285, 290, 234 N.Y.S.2d 285, affd. 13 N.Y.2d 744, 241 N.Y.S.2d 869, 191 N.E.2d 919 is a clear answer to this unsubstantiated judgment.

> "Nothing in the broad definition of the duties of sergeant (Rules and Procedures of the Police Department, par. 16.3) are [*sic*] clearly impossible of performance by policewomen because of sex. There are practical physical problems which warrant reasonable distinctions because of facilities, and even the very nature of a particular problem may necessitate a uniquely desirable approach, independent of considerations of sex. The Commissioner remain vested with discretionary power to use his best judgment. We hold no more than that petitioner and other similarly situated cannot be arbitrarily denied the right to take the examination for sergeant because of their sex, and no reason-

able grounds have been shown to warrant the 'sex selection' evidenced.

"From the record women are serving as superior police officers in other cities of this country and in London as well. We would suppose, in the absence of contrary evidence, that the problems of law enforcement officers in such cities differ more in degree than in kind from those encountered here. The capacity and ability of females to hold a superior office in a police department has been demonstrated by the experience of other cities. We conclude that the denial of eligibility is solely because of sex, is unwarranted in law and, in light of present-day conditions constitutes an abuse of discretion."

Implicit in the arguments of respondents is the unspoken assumption that one cannot supervise a patrolman without having served as such for four years, but they present no proof of the validity of that assumption. A court may not shut its eyes to the fact that women occupy many supervisory positions in the business world and, as is noted in *Shpritzer,* in the police deparments of New York City, London and other cities. where they have satisfactorily filled supervisory positions.

Appellants assert in their brief, and it is not contradicted by respondents, that "many police sergeants who are in charge of patrolmen on the street, were never patrolmen in the sense of a foot patrolman or traffic squad", but had worked as patrolmen "in Identification Bureau, Scientific Investigation Bureau, Liaison work," and. as such, "saw no more street action than had the petitioners" and yet they were nevertheless "eligible for the police sergeant's test and are presently suprvising men on the street."

Appendix B

Special Term, while citing *Shpritzer*, distinguished it, among other reasons, because in New York City policewomen were completely excludede from promotion to the rank of sergeant whereas in our case policewomen can be promoted to policewoman sergeant. This argument seems to me to be clearly specious, because petitioners here, by being denied the opportunity to take the sergeant's examinations, are limited to an examination that makes them eligible for only two openings for the position of policewoman sergeant. Furthermore, and in the event of their promotion to that position, they will be limited to supervision solely of policewomen, who deal primarily with women and juveniles, whereas access to and success in the police sergeant's examination will open a much larger number of job opportunities and a more varied spectrum of supervisory work, with possibilities for further promotion. What probably makes the Police Commissioner boggle, and caused him to warn of chaos, is that the supervisory authority of all successful takers of the police sergeant's examination (including policewomen candidates if they were permitted to take the examination) would be over policemen, males. However, the bar on discrimination in employment based on sex nowhere provides that a practice of denying women who qualify for supervisory jobs the right to fill those jobs because they involve supervision over males is a proper exercise of a bona fide occupational qualification, or is not discrimination based on sex.

Similarly, the argument that there is no discrimination where women are offered an examination which will qualify them to supervise women but not men, even though there is no rational basis for so limiting the positions they supervise, fails because if, in fact, this results in denial to them of an opportunity for a supervisory job for which they are qualified, the effect is still discriminatory. As

Appendix B

Chief Justice Vinson said in Shelley v. Kraemer, 334 U.S. 1, 22, 68 S. Ct. 836, 92 L.Ed. 1161, "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."

I therefore dissent and vote to reverse and to grant petitioners the relief they seek.

Appendix C

SUPREME COURT — STATE OF NEW YORK
SPECIAL TERM, PART 1. — NASSAU COUNTY

Present: BERTRAM HARNETT
(Same Title).

Index Number: 4209, 1972
Motion Date: April 14, 1972
Motion Cal. Number: 32

The following papers numbered 1 to 21 read on this application pursuant to Article 78 of the CPLR.

Order to Show Cause Exhibits	1 - 11
Answering Affidavits	12 - 20

Briefs: Petitioner's 21.22 Respondent's 23.

Upon the foregoing papers it is ordered that this application be denied and the petition dismissed, for the considerations more fully set forth in the memorandum filed herewith.

Justice.

Dated: March 28, 1972

J.S.C.

MEMORANDUM

BERTRAM HARNETT, Justice.

"Frailty, thy name is woman!" sayeth William Shakespeare in the sixteenth century (*Hamlet*, Act I. Scene ii). Not so, say five Nassau County policewomen who demand the opportunity to become police sergeants. Therein lies a modern tale of exclusion from employment classification.

Appendix C

The five policewomen each seek appointment to the position of police sergeant, and have applied to take the appropiate Civil Service examination.

Under the policies and rules of the County Civil Service Commission and Police Department, the women were found ineligible to take the police sergeant examination, since only those serving as patrolmen qualify for promotion to police sergeant. However, the women were informed they could take an examination for the position of "policewoman sergeant". Apparently, vacancies are available for two policewoman sergeants, and an undisclosed number of police sergeants.

The women claim that, in being barred from the police sergeant's examination, they are in reality being discriminated against on the basis of sex and seek in this class proceeding to enjoin the giving of the separate police sergeant and policewoman sergeant examinations on April 29, 1972. The County officials essentially defend that the job classifications are reasonably drawn with respect to required experience and ability to perform.

The opportunity to obtain employment without discrimination because of sex is a civil right. Executive Law, § 291. When a particular sex is a "bona fide occupational qualification", as for instance a female dramatic role, employment lines can be drawn to include that sex alone. Executive Law, § 296(1) (d); see, Civil Service Law, § 50 (7); 42 U.S.C. § 2000e-2(e). Otherwise, it is unlawful to refuse to hire or employ any individual purely because of sex. Executive Law, § 296; Title VII of the Civil Rights Act of 1964.

[1] The Police Department is not legally shielded from the requirement of providing equal employment opportunity to, and recognizing the civil rights of, its members.

See, Mize v. State Division of Human Rights, 38 A.D.2d 278, 328 N.Y.S.2d 983.

The question here is whether the requirement of being a police patrolman is a *bona fide* occupational qualification for police sergeant. Traditional notions of femininity versus masculinity must be excluded. 29 CFR §1604.1; New York State Division of Human Rights v. New York-Pennsylvania Professional Baseball League, 36 A.D.2d 364, 320 N.Y.S2d 788, affd. 29 N.Y.2d 921, 329 N.Y.S.2d 99, 279 N.E.2d 856; Udall v. Tallman, 380 U.S. 1, 16, 85 S. Ct. 792, 13 L.Ed.2d 616.

[2] The County people first argue that police sergeants uniquely observe conditions at police posts, inspect departmental vehicles for serviceability and cleanliness and direct investigations. However, since no proof whatever was introduced to show that policewomen cannot perform these functions, these duties alone cannot justify the exclusion of women. *Cf.* Weeks 1. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969).

[3] More to the point is the General Statement of Duties for the police sergeant class which specifies that a police sergeant:

> "supervises the activities of patrolmen on an assigned shift within the command to which he is attached...".

While the women claim that patrolmen and policewomen have identical duties, the specific job descriptions attached as exhibits to the officials' affidavits show otherwise. Patrolmen are assigned to significant duties policewomen do not perform, including general police patrol functions such as fights, stickups, armed robberies, homicides, directing traffic, making arrests and preserving the public

peace. Patrolmen have experience in performing these duties; policewomen do not. It is reasonable to provide that a sergeant charged with the duty of supervising patrolmen should have experience in the very operation he must supervise. None of the women have this experience, not unremarkably since those duties have been exclusively reserved for men. Apparently,the women have not formally complained about being exclude from performing the duties of patrolmen; yet, because of the missing job experience, they now lack an essential *bona fide* job qualification for supervising patrolmen. The Court finds therefore that restricting the job of police sergeant to patrolmen does not violate the Executive or Civil Service Laws and is reasonable under the Fourteenth Amendment to the United States Constitution.

The women rely heavily on Matter of Shpritzer v. Lang, 17 A.D.2d 285, 234 N.Y.S.2d 285 (1st Dept.), affd. 13 N.Y.2d 744, 241S.2d 869, 191 N.E.2d 919, holding New York City policewomen are entitled to take an otherwise all male police sergeant examination. However, New York City had local legislation conferring all rights and privileges of patrolmen upon policewomen (17 A.D.2d at 289, 234 N.Y.S.2d at 289), and no such provisions appear in Nassau County. Moreover the records indicate a significantly broader policing function for New York City policewomen than currently appear for Nassau policewomen. Finally, the women in *Shpritzer* were excluded from any promotion to the rank of sergeant, whereas Nassau policewomen can be promoted with equal pay to policewoman sergeant.

In essence, the Court's finding here is simply that the women cannot succeed in becoming police sergeants unless they first establish themselves experientially as patrolmen. Whether women are being lawfully precluded as "patrolmen" is a different question and a different case than the

one presented here. That doubtless awaits a later judicial date.

The idea that women as such cannot be "patrolmen" will not be upheld unless supported by actual proof. *Cf.* New York Division of Human Rights v. New York-Pennsylvania Professional Baseball League, *supra* (sustaining a woman as a professional baseball umpire). Stereotyped characterizations, no matter how ingrained, are meant to be forestalled by the Executive Law and the Civil Rights Act of 1964. See, Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971); Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971); Matter of Shpritzer v. Lang, *supra,* suggests that the question of women on patrol duty may be far from academic.

The governing principle of non-discrimination requires that people be considered on the basis of their individual capabilities and not on the bases of any characteristics generally attributable to the group, or characteristics generally irrelevant to the job. *Cf.* Ridinger v. General Motors Cor., 325 F. Supp. 1089, 1096 (S.D.W.D. Ohio 1971).

In an interesting article, "The Women in Blue", appearing on page 60 of Time Magazine, May 1, 1972, it is reported that in seven cities womtn are driving squad cars, responding to radio calls, and investigating crimes. Time further reports that about 45 women are now "pounding beats" in this country, and that the Washington, D.C. police force is hiring 100 women for "regular patrol duty".

The problem is not an easy one. Subtle psychological resistance to the idea of policewomen performing regular patrol duties crops up even in the very Time article which recites their favorable usage. The Time article goes so far as to suggest that the wider use of policewomen might

make police work more effective generally because of a built in "calming effect" on violence. But after all is said and done, the article concludes with the "male chauvinistic put down" classic to the advocates of the women's rights:

> "Those who are there already have provided a devastating new weapon to the police crime-fighting arsenal, one that has helped women to get their men for centuries. It worked well for diminutive Patrolwoman Ina Shepperd after she collared a muscular shoplifter in Miami last December and discovered that there were no other cops—or even a telephone—around. Unable to summon help, she burst into tears. 'If I don't bring you in, I'll lose my job.' she sobbed to her prisoner, who chivalrously accompanied her until a squad car could be found".

Accordingly, petioners' application is denied and the petition discussed.

Appendix D

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

EXECUTIVE LAW OF THE STATE OF NEW YORK

§291. Equality of opportunity a civil right

1. The opportunity to obtain employment without discrimination because of race, creed, sex, color or national origin is hereby recognized as and declared to be a civil right.

EXECUTIVE LAW OF THE STATE OF NEW YORK

§296. Unlawful discriminatory practices

1. It shall be an unlawful discriminatory practice:

(a) For an employer, because of the age, race, creed, color, national origin or sex of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

(b) For an employment agency to discriminate against any individual because of his age, race, creed, color, na-

tional origin or sex, in receiving, classifying, disposing or otherwise acting upon applications for its services or in referring an applicant or applicants to an employer or employers.

(c) For a labor organization, because of the age, race, creed, color or national origin or sex of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer.

(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color or national origin or sex, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification; provided, however, that neither this paragraph nor any provision of this chapter or other law shall be construed to prohibit the department of civil service or the department of personnel of any city containing more than one county from requesting information from applicants for civil service examinations concerning any of the aforementioned characteristics for the purpose of conducting studies to identify and resolve possible problems in recruitment and testing of members of minority groups to insure the fairest possible and equal opportunities for employment in the civil service for all persons, regardless of age, race, creed, color, national origin or sex.

(e) For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices

forbidden under this article or because he has filed a complaint, testified or assisted in any proceeding under this article.

CIVIL SERVICE LAW OF THE STATE OF NEW YORK

§50. Examinations generally

1. . .
2. . .
3. . .
4. . .
5. . .
5. . .

7. Limitation of eligibility to one sex. The state civil service department or the municipal commission having jurisdiction may limit eligibility for examination to one sex when the duties of the position involved relate to the institutional or other custody or care of persons of the same, or visitation, inspection or work of any kind the nature of which requires sex selection.

UNITED STATES CODE, TITLE 42, §20003 - 2

§2000e—2. Unlawful employment practices — Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual

of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) . . . .
(c) . . . .

TRAINING PROGRAMS

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program establish to provide apprenticeship or other training.

BUSINESS OR ENTERPRISES WITH PERSONNEL QUALIFIED ON BASIS OF RELIGION, SEX, OR NATIONAL ORIGIN; EDUCATIONAL INSTITUTIONS WITH PERSONNEL OF PARTICULAR RELIGION

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer to employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and

(2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) . . . .
(g) . . . .
(h) . . . .
(i) . . . .
(j) . . . .

ARTICLE I, NEW YORK STATE CONSTITUTION

§11. [Equal protection of laws; discrimination in civil rights prohibited.]

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state. Adopted by Constitutional Convention of 1938; approved by the people Nov. 8, 1938.

Appendix E

Title: Policewoman Sergeant
Code: 630246
Page: 1 of 2

NASSAU COUNTY
CLASS SPECIFICATION
GENERAL STATEMENT OF DUTIES

Supervises the activities of policewomen on an assigned shift within the command to which she is attached; perperforms related duties as required.

COMPLEXITY OF DUTIES

Under supervision, the duties include planning, directing, and organizing the investigate activities of subordinate policewomen, particularly as related to women and juveniles.

TYPICAL DUTIES

1. Supervises, instructs, and assists policewomen in the discharge of their duties.

2. Supervises, directs, and performs investigations involving neglected, abused, or delinquent children.

3. Supervises and participates in the inspection of disorderly or suspicious premises which may be frequented by women or minors and the handling of cases involving missing women and juveniles.

4. Visits, inspects, and observes the conditions and manner in which investigations are conducted.

5. Reviews reports submitted by policewomen.

6. Prepares daily report of activities.

Appendix E

QUALIFICATIONS

Knowledge, Skills And Abilities

1. Considerable knowledge of the principles and practices of police work.

2. Considerable knowledge of criminal laws and procedures.

3. Considerable knowledge of the methods, techniques, and procedures involved in crime investigation.

4. Knowledge of first aid methods and procedures.

5. Skill in the use of firearms.

6. Ability to instruct and direct subordinate policewomen.

7. Ability to maintain records and prepare reports.

Training And Experience

Four years of service as Policewoman immediately prior to the date of promotion examination.

1/17/72

Appendix E

Title: Police Sergeant
Code: 630253
Page: 1 of 2

NASSAU COUNTY
CLASS SPECIFICATION
GENERAL STATEMENT OF DUTIES

Supervises the activities of policewomen on an assigned shift within the command to which he is attached; performs related duties as required.

COMPLEXITY OF DUTIES

Under supervision, the duties involve the planning, directing, and organizing of activities of the patrolmen under his control and the work is subject to review by superiors.

TYPICAL DUTIES

1. Assists and instructs patrolmen in the discharge of their duties.

2. Visits and inspects posts to observe conditions and manner in which patrol duty is performed.

3. Reviews reports submitted by patrolmen.

4. Inspects departmental vehicles and equipment assigned to patrolmen for serviceability, cleanliness, and accuracy of speedometer readings.

5. Prepares daily report of activities during assigned shift.

6. Directs and performs criminal investigations as assigned.

Appendix E

QUALIFICATIONS

Knowledge, Skills and Abilities

1. Considerable knowledge of principles and practices of police work.

2. Considerable knowledge of criminal laws and procedures.

3. Considerable knowledge of traffic control and crime investigation methods, procedures and techniques.

4. Knowledge of first aid methods and procedures.

5. Skill in the use of firearms.

6. Ability to transmit complex oral and written instructions by means of radio and teletype equipment.

7. Ability to instruct and direct subordinate patrolmen.

8. Ability to maintain records and prepare reports.

Title: Police Sergeant
Code: 630253
Page: 2 of 2

Training and Experience

Four years of service as Patrolman immediately prior to the date of promotion examination.

Additional requirements for promotion after January 1, 1974: Successful completion of two years of college (Civil Service Commission Resolution No. 41/69) Revised 4/14/69.

Appendix F

(LETTERHEAD OF)

NASSAU COUNTY CIVIL SERVICE COMMISSION

Examinations to be held on
April 29, 1972
Applications accepted up to
March 29, 1972

PROMOTION EXAMINATION
EXAMINATION NO. 75-504
POLICE SERGEANT
NASSAU COUNTY

SALARY: $15,805.

DUTIES: Supervises the activities of patrolmen on an assigned shift within the command to which he is attached; performs related duties as required.

MINIMUM QUALIFICATIONS: Candidates must meet the following requirement on or before the date of the written test. Candidates must be permanently employed in the *NASSAU COUNTY POLICE DEPARTMENT* and must have served on a permanent basis in the competitive class for *four* years immediately preceding the date of the written test as a *Police Patrolman.* Candidates who have had four years of service, including the probationary period, preceding the date of the examination will be permitted to participate in the examination but no candidate will be certified for appointment until he has completed four years of permanent service.

VACANCIES: The eligible list establish as a result of this examination will be used to fill vacancies as they occur.

Appendix F

SUBJECTS OF EXAMINATION:

WRITTEN TEST as described in Scope of Written Test below .....relative weight 7

**Service rating* .....relative weight 2

+Departmental Rules and Regulations....relative weight 1

Service rating will cover the period four years immediately preceding April 29, 1972.

*Service may not be rated if all successful candidates are expected to be immediately reachable for appointment. When it is not rated, your standing on the eligible list will be based on the other subjects of examination, with relative weight as indicated

"THE FINAL RATING KEY FOR THIS EXAMINATION WILL BE ESTABLISHED BY THE STATE CIVIL SERVICE COMMISSION PRIOR TO THE TESTING DATE, UPON RECOMMENDATION OF A COMMITTEE OF POLICE EXPERTS WHO WILL REVIEW ALL THE QUESTIONS FOR APPROPRIATENESS AND ACCURACY. THERE WILL BE NO REVIEW OF THE QUESTIONS BY CANDIDATES. THIS COMMITTEE WAS SELECTED WITH THE ASSISTANCE OF AND THE ENDORSEMENT BY THE POLICE CONFERENCE OF NEW YORK INC. AND THE NEW YORK STATE ASSOCIATION OF CHIEFS OF POLICE, INC." *NOR WILL THERE BE ANY REVIEW OF THE QUESTIONS ON THE DEPARTMENTAL RULES AND REGULATIONS BY THE CANDIDATES NOR ANY APPEALS TO THE ANSWERS TO THESE QUESTIONS SINCE THEY HAVE BEEN REVIEWED BY A COMMITTEE OF ADMINISTRATIVE OFFICIALS OF THE NASSAU COUNTY POLICE DEPARTMENT.*

Appendix F

SCOPE OF WRITTEN TEST:

1. New York State law, which will include the Penal Law. Criminal Procedure Law (effective September 1, 1971), Vehicle and Traffic Law and the Family Court Act;

2. modern law enforcement methods and practices and the use of good judgment in solving police problems;

EXHIBIT "A"

GENERAL INSTRUCTIONS

All inquiries should be directed to the Executive Director, Nassau County Civil Service Commission, Old Country Road. Mineola, New York 11501.

In writing for application form or information, candidates should indicate the examination number and title of the position.

Do not wait until the last day to file your application. Send applications and cards properly completed to the Nassau County Civil Service Commission, Mineola, New York 11501, as soon as possible after the announcement of the examination. Make sure that every question is answered and that required certificates, licenses, transcripts and veteran's forms are included where necessary.

If education beyond high school is required for eligibility, official transcripts must be submitted. If transcripts were filed previously with the Civil Service Commission, a notation should be made on the application.

As an aid in rating training and experience, interviews may be required at a later date.

Appendix F

Candidates should be mentally and physically fit to perform the duties compatible with the position. Medical or physical examination may be required.

All statements are subject to verification. Inquiries may be made as to character and qualifications.

A record of disrespect for the requirements and processes of law, including repeated traffic offenses or disregard of summonses for traffic offenses, is grounds for disqualification for examination, or after examination, for certification and appointment.

The Commission does not acknowledge receipt of applications. If an application is rejected, candidate will be notified. Candidates will be notified when and where to appear for examination.

The Commission reserves the right, after this announcement is made, to subdivide the examination and to require a specific passing mark in one or more of such subdivisions, in order that a candidate be considered further for eligibility. Notice of such arrangement will be given in the examination instruction.

Candidates will be fingerprinted at the time of the examination.

No candidate is permitted to take more than one written examination on the same day unless otherwise specified.

No one will be admitted to the examination without the *official notice.*

Lists made up as a result of these tests will remain in force for at least one year and may be extended by the Commission not to exceed four years.

Changing conditions may make it advisable to certify to future vacancies at higher or lower salaries than those announced.

Appendix F

RESIDENCE - Unless otherwise specified, all candidates are required to be legal residents of Nassau County for not less than one year immediately preceding advertised date of examination. *Nassau County Charter requires continuous residence.*

CITIZENSHIP - United States Citizenship is a qualification for appointment to positions in the competitive class. Noncitizens may participate in competitive examinations and be eligible for appointment after acquisition of citizenship. Documentary proof of citizenship should be presented in person or sent to this Commission by registered mail as promptly as possible. Naturalized citizens should submit proof when filing application. If naturalized directly, the applicant's final certificate of naturalization must be submitted. If citizenship is claimed by the naturalization of a parent during minority of child. final naturalization of parent must be submitted. If the original naturalization papers have been lost a copy of the naturalization certificate should be procured from the naturalization Bureau, Washington, D.C. Full citizenship and final papers are necessary prior to appointment, unless otherwise specified.

MILITARY SERVICE - Any person who is in the Armed Services during the regular filing period, and is subsequently discharged under honorable conditions may receive and file an application for any announced examination for which he is eligible, after the regular filing period, provided he appears at the office of the Civil Service Commission, in person, before 4:00 P.M. of the tenth calendar day prior to the date of the written examination, bringing with him at the time, proof of his identity and his discharge from the Armed Services. Veterans claiming credit points or disabled veteran's credit points should request the appropriate form to file with application. Vet-

teran's credit form must be submitted with your discharge and separation papers. They will be reviewed, verified and returned to you by registered mail.

3. supervision and administration;
4. the preparation of written material;
5. understanding and interpreting written material;
+ departmental rules and regulations.

Points will be added to an eligible's score as follows:

SENIORITY: One tenth (.10) of a point will be added to an eligible's score for each six months of permanent competitive class Nassau County Service up to a maximum of twenty years.

PLEASE NOTE: THE LAST DAY FOR FILING IS MARCH 29, 1972

The Nassau County Civil Service Commission reserves the right to reject for lateness or to accept applications filed after the advertised filing period.

APPLICATIONS MAY BE OBTAINED IN PERSON OR YOU MAY FORWARD A STAMPED, SELF-ADDRESSED BUSINESS SIZE ENVELOPE BEFORE MARCH 23, 1972.

This written examination is being prepared and rated by the New York State Department of Civil Service in accordance with Section 23-2 of the Civil Service Law.

FOR ADDITIONAL EXAMINATION INFORMATION, PLEASE CALL (516) 535-2511.
Date issued: March 9, 1972.
CSC No. 4825P

Appendix F

(LETTERHEAD OF)

NASSAU COUNTY CIVIL SERVICE COMMISSION

APPLICATIONS ACCEPTED UP TO
APRIL 29, 1972

EXAMINATION TO BE HELD ON
APRIL 29, 1972

PROMOTION EXAMINATION
EXAMINATION NO. 75-520
POLICEWOMAN SERGEANT
NASSAU COUNTY

SALARY: $15,805.

MINIMUM QUALIFICATIONS: Candidates must meet the following requirement on or before the date of the written test. Candidates must be permanently employed in the *NASSAU COUNTY POLICE DEPARTMENT* and must have served on a permanent basis in the competitive class for *four* years immediately preceding the date the written test as a *Policewoman* Candidate who had four years of service, including the probationary period, preceding the date of the examination will be permitted to participate in the examination but no candidate will be certified for appointment until he has completed four years of permanent service.

VACANCIES: The eligible list establish as a result of this examination will be used to fill vacancies as they occur.

Appendix F

SUBJECTS OF EXAMINATION:

WRITTEN TEST as described in Scope of Written Test below .....relative weight 7

**Service rating* .....relative weight 2

+Departmental Rules and Regulations....relative weight 1

Service rating will cover the period four years immediately preceding April 29, 1972.

*Service may not be rated if all successful candidates are expected to be immediately reachable for appointment. When it is not rated, your standing on the eligible list will be based on the other subjects of examination, with relative weight as indicated

"THE FINAL RATING KEY FOR THIS EXAMINATION WILL BE ESTABLISHED BY THE STATE CIVIL SERVICE COMMISSION PRIOR TO THE TESTING DATE, UPON RECOMMENDATION OF A COMMITTEE OF POLICE EXPERTS WHO WILL REVIEW ALL THE QUESTIONS FOR APPROPRIATENESS AND ACCURACY. THERE WILL BE NO REVIEW OF THE QUESTIONS BY CANDIDATES. THIS COMMITTEE WAS SELECTED WITH THE ASSISTANCE OF AND THE ENDORSEMENT BY THE POLICE CONFERENCE OF NEW YORK INC. AND THE NEW YORK STATE ASSOCIATION OF CHIEFS OF POLICE, INC." *NOR WILL THERE BE ANY REVIEW OF THE QUESTIONS ON THE DEPARTMENTAL RULES AND REGULATIONS BY THE CANDIDATES NOR ANY APPEALS TO THE ANSWERS TO THESE QUESTIONS SINCE THEY HAVE BEEN REVIEWED BY A COMMITTEE OF ADMINISTRATIVE OFFICIALS OF THE NASSAU COUNTY POLICE DEPARTMENT.*

Appendix F

SCOPE OF WRITTEN TEST:

1. New York State law, which will include the Penal Law. Criminal Procedure Law (effective September 1, 1971), Vehicle and Traffic Law and the Family Court Act;
2. modern law enforcement methods and practices and the use of good judgment in solving police problems;
3. supervision and administration;
4. the preparation of written material;
5. understanding and interpreting written material;

+ departmental rules and regulations.

EXHIBIT "B"

GENERAL INSTRUCTIONS

All inquiries should be directed to the Executive Director, Nassau County Civil Service Commission, Old Country Road. Mineola, New York 11501.

In writing for application form or information, candidates should indicate the examination number and title of the position.

Do not wait until the last day to file your application. Send applications and cards properly completed to the Nassau County Civil Service Commission, Mineola, New York 11501, as soon as possible after the announcement of the examination. Make sure that every question is answered and that required certificates, licenses, transcripts and veteran's forms are included where necessary.

If education beyond high school is required for eligibility, official transcripts must be submitted. If transcripts

were filed previously with the Civil Service Commission, a notation should be made on the application.

As an aid in rating training and experience, interviews may be required at a later date.

Candidates should be mentally and physically fit to perform the duties compatible with the position. Medical or physical examination may be required.

All statements are subject to verification. Inquiries may be made as to character and qualifications.

A record of disrespect for the requirements and processes of law, including repeated traffic offenses or disregard of summonses for traffic offenses, is grounds for disqualification for examination, or after examination, for certification and appointment.

The Commission does not acknowledge receipt of applications. If an application is rejected, candidate will be notified. Candidates will be notified when and where to appear for examination.

The Commission reserves the right, after this announcement is made, to subdivide the examination and to require a specific passing mark in one or more of such subdivisions, in order that a candidate be considered further for eligibility. Notice of such arrangement will be given in the examination instruction.

Candidates will be fingerprinted at the time of the examination.

No candidate is permitted to take more than one written examination on the same day unless otherwise specified.

No one will be admitted to the examination without the *official notice.*

Appendix E

Lists made up as a result of these tests will remain in force for at least one year and may be extended by the Commission not to exceed four years.

Changing conditions may make it advisable to certify to future vacancies at higher or lower salaries than those announced.

RESIDENCE - Unless otherwise specified, all candidates are required to be legal residents of Nassau County for not less than one year immediately preceding advertised date of examination. *Nassau County Charter requires continuous residence.*

CITIZENSHIP - United States Citizenship is a qualification for appointment to positions in the competitive class. Noncitizens may participate in competitive examinations and be eligible for appointment after acquisition of citizenship. Documentary proof of citizenship should be presented in person or sent to this Commission by registered mail as promptly as possible. Naturalized citizens should submit proof when filing application. If naturalized directly, the applicant's final certificate of naturalization must be submitted. If citizenship is claimed by the naturalization of a parent during minority of child. final naturalization of parent must be submitted. If the original naturalization papers have been lost a copy of the naturalization certificate should be procured from the naturalization Bureau, Washington, D.C. Full citizenship and final papers are necessary prior to appointment, unless otherwise specified.

MILITARY SERVICE - Any person who is in the Armed Services during the regular filing period, and is subsequently discharged under honorable conditions may receive and file an application for any announced examination for which he is eligible, after the regular filing

period, provided he appears at the office of the Civil Service Commission, in person, before 4:00 P.M. of the tenth calendar day prior to the date of the written examination, bringing with him at the time, proof of his identity and his discharge from the Armed Services. Veterans claiming credit points or disabled veteran's credit points should request the appropriate form to file with application. Veteran's credit form must be submitted with your discharge and separation papers. They will be reviewed, verified and returned to you by registered mail.

Points will be added to an eligible's score as follows:

SENIORITY: One tenth (.10) of a point will be added to an eligible's score for each six months of permanent competitive class Nassau County Service up to a maximum of twenty years.

PLEASE NOTE: THE LAST DAY FOR FILING IS MARCH 29, 1972

The Nassau County Civil Service Commission reserves the right to reject for lateness or to accept applications filed after the advertised filing period.

APPLICATIONS MAY BE OBTAINED IN PERSON OR YOU MAY FORWARD A STAMPED, SELF-ADDRESSED BUSINESS SIZE ENVELOPE BEFORE MARCH 23, 1972.

This written examination is being prepared and rated by the New York State Department of Civil Service in accordance with Section 23-2 of the Civil Service Law.

FOR ADDITIONAL EXAMINATION INFORMATION, PLEASE CALL (516) 535-2511.
Date issued: March 9, 1972.
CSC No. 4825P

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IN THE

Supreme Court of the United States

1973 TERM

No. 73 427

In the Matter of the Application of

DIANE BERNI, BARBARA D. HAHN, DONNA M. MARSH, LOIS NEWMAN, CAROL RYDER, and all those similarly situated,

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules,

Petitioners,

— against —

ADELE LEONARD, Executive Directrix of the Nassau County Civil Service Commission and the Nassau County Civil Service Commission, and LOUIS J. FRANK, Commissioner of Police of the County of Nassau and the POLICE DEPARTMENT OF THE COUNTY OF NASSAU,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Argument in Opposition to Granting a Writ of Certiorari

POINT I

Petitioners are not qualified to take the promotional examination for police sergeant on the basis that they lack the required qualifications and experience of patrolmen.

In their petition to this court, petitioners attempt to make out a case that there has been a deprivation of a

constitutional right. On this point, petitioners differ from the learned judges in the courts below who have ruled in this matter. It is respondents' position, as well as that of every court below, that there is only one real question presented by this case: Are petitioners, in fact, qualified to take the promotional examination and serve in the position of Police Sergeant?

Petitioners state that the Police Department of Nassau County must recognize the civil rights of all of its members. *Mize* v. *State Division of Human Rights,* 38 A.D. 2d 278 (4th Dept., 1972). With this, respondents are in complete agreement, for it is respondents' position that in no way have petitioners' civil rights been violated.

To strengthen their position, petitioners stress the intent of the New York State law that guarantees the opportunity to obtain employment without discrimination because of sex. Executive Law §291. But, what is involved in the case at bar is an important exception to the law. When a particular sex is a "bona fide occupational qualification" for a position, then employment lines can be drawn to include that sex alone. Executive Law §296 (1)(d); see Civil Service Law §50(7); 42 USC §2000e-2(e). The respondents, and all of the courts below, agree that the job classifications involved are reasonably drawn with respect to the required experience and ability necessary to perform in the position of Police Sergeant.

A major qualification and requirement to take the Police Sergeant promotional examination is four years experience as a patrolman. Petitioners do not meet this requirement. Because they lack this requisite "seasoning" from on-the-job experience, petitioners have not been permitted to take the promotional examination for Police Sergeant.

The duties and responsibility of a patrolman are markedly different from those duties to which petitioners have been assigned. The routine duties of a Patrolman

include responding to general calls in family disturbances, fights, stickups, homicides, automobile accidents, making arrests and preserving the public peace. A Patrolman may be assigned to act as a service monitor, operate emergency equipment, enforce vehicle and traffic laws and "walk the beat". Patrolmen, in most cases, must work "around the clock" in rotating shifts. On the other hand, the petitioners' experience has been limited to investigative services addressed primarily to women and minors. In commenting upon the drastic differences between the duties of a Patrolman and a Policewoman, the court below, in *Matter of Berni* v. *Leonard*, 69 Misc. 2d 935, 936-937, observed:

> "It is reasonable to provide that a sergeant charged with the duty of supervising patrolmen should have experience *in the very operation he must supervise.* None of the women have this experience, not unremarkably since those duties have been exclusively reserved for men. Apparently, the women have not formally complained about being excluded from performing the duties of patrolmen; yet, because of the missing job experience, they now lack an essential *bona fide* job qualification for supervising patrolmen. The court finds, therefore, that restricting the job of a police sergeant to patrolmen does not violate the Executive or Civil Service Laws and is reasonable under the Fourteenth Amendment to the United States Constitution."

Contrary to petitioners' allegation, it is not arbitrary and capricious to require Patrolman's experience for a supervisory position which requires an intimate knowledge of a Patrolman's activities. Petitioners are not, as they allege, being excluded on the basis of sex. Petitioners admit that they do not have the experience a Patrolman gains while on the job. One can hardly say, therefore, that classifying them as unqualified is discriminating—rather,

it is in the stream of standard promotional procedure.

All the courts below have held, and respondents now contend, that petitioners have not been denied equal protection under the laws on the basis of the sexes. The plain truth is that petitioners, on the basis of traditional standards of merit and fitness, do not qualify for the position of Police Sergeant.

When an applicant does not qualify for the position he seeks, New York law gives the Civil Service Commission involved the right to exclude such person from the examination for that position. Civil Service Law §50(4)(a) provides as follows:

> "§50(4) Disqualification of applicants or eligibles. The State Civil Service Department and municipal commissions may refuse to examine an applicant, or after examination to certify an eligible
> "(a) who is found to lack any of the established requirements for admission to the examination or for appointment to the position for which he applies...."

The right of civil service commissions to establish reasonable requirements for a particular position is undisputed. As the court stated in *Fitzgerald* v. *Conway*, 275 A.D. 205, 209 (1949), *leave to appeal den.*, 299 N.Y. 798:

"The preparation and conduct of civil service examinations are administrative functions vested in the Civil Service Commission. In the exercise of these functions the commission has broad discretionary powers to determine, among other things, all matters relating to the time and place of the examination; the selection of questions to be used; the manner of conducting the tests; the relative values to be given to different sections of the tests; whether the examination shall be open or promotional and the preliminary requirements and subjects of the examination. So long as these discretionary powers are fairly and reasonably exercised the court will not intervene to substitute

its judgment for that of the commission. It is only when such powers have been unreasonably and arbitrarily used, or exercised in violation of some constitutional or statutory provision, that the intervention of the court may be successfully invoked."

The respondents respectfully submit that there has been no showing on petitioners' part that the discretionary powers of the Nassau County Civil Service Commission have been unfairly and unreasonably exercised so as to require a court to substitute its judgment for the judgment of the Commission. In support of this proposition, the Court of Appeals, in *Matter of Wirzberger* v. *Watson*, 305 N.Y. 507, 513 (1953), stated:

> "The decisional law on the problem is that the Commission's fixing of the minimum requirements for admission to an examination is not to be interfered with by the courts if any fair argument can be made to sustain its action, '* * * even though they may differ from the commission as to its advisability." (*People ex rel. Moriarty* v. *Creelman*, 206 N.Y. 570, 575-576; *People ex rel. Schau* v. *McWilliams*, 185 N. Y. 92, 99; *Matter of Laverty* v. *Finegan*, 249 App. Div. 411, affd. 275 N. Y. 555; *Matter of Davis* v. *Wiener*, 260 App. Div. 127, aff'd. 285 N. Y. 537; and see *Matter of Murray* v. *McNamara*, 303 N. Y. 140, 144.)

Petitioners allege that the "bona fide occupational qualification" established by respondents is irrational in that a Patrolman assigned to specialized duties is permitted to take the examination for Police Sergeant. Respondents wish to emphasize the fact that virtually every individual holding the rank of Patrolman has had at least minimal experience with routine police duties. In contrast to this, none of petitioners has had, at any time, any experience with routine police work whatsoever.

The petitioners rely on the case of *Matter of Shpritzer* v. *Lang*, 17 A.D.2d 285, *aff'd.*, 13 N.Y.2d 744 (1964), in support of the proposition that the New York City Police Department must allow women as well as men to take promotional examinations for Police Sergeant. But it is submitted that that case is clearly distinguishable from the case at bar. In *Shpritzer*, women were allowed to hold only one rank within the department—that of Policewoman, and therefore there was no possibility of promotion to higher rank. Also, in the New York City Police Department, Policewomen are involved in a significantly broader policing function than in the Nassau County Police Department. In the present case, there is a rank of Policewoman Sergeant, as well as a test to provide an opportunity to achieve said rank. Indeed, petitioners were eligible for and could have taken Promotion Examination No. 75-520, Policewoman Sergeant, on April 29, 1972. It can, therefore, be seen that petitioners, unlike the petitioners in *Shpritzer*, were not denied promotional opportunities solely because of sex.

Finally, we must mention that the New York State Legislature has recently amended the Civil Service Law and the Executive Law (see Chapter 66, Laws of New York, 1973). These amendments include women within the existing police appointment requirements applicable only to men in the past. The result of these changes will be that women will have the opportunity to serve in the rank of Patrolman in the Nassau County Police Department. This, in turn, will provide them with the required experience and training to qualify to take the promotional test for Police Sergeant. Unlike petitioners in the present case, these women holding the rank of Patrolman will completely meet the qualifications to take the test for Police Sergeant and then serve in that capacity if so appointed.

CONCLUSION

For the reasons stated above, respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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